

doing business that the cable operator should also be able to recoup. If the regulations are designed to establish fair and adequate rates, they must reflect these costs. As discussed above, failure to recoup the actual costs of doing business could result in service derogation or hinder further system development. Moreover, unless promotion costs can be recouped, cable operators will be discouraged from offering these opportunities and the public will be deprived of the promotion benefits it currently enjoys.

III. OTHER ASPECTS OF THE ORDER REQUIRE RECONSIDERATION OR CLARIFICATION

A. Uniform Rate Structures Should Not Prevent Pricing to Meet Competition

The Report and Order confirms that the "uniform rate

structure" provision of the Cable Act²⁶ does not preclude

permissible.^{28/} The Joint Petitioners seek clarification that the Cable Act also permits cable operators to offer discounted service pursuant to the Commission's longstanding "Competitive necessity" doctrine.

Under the competitive necessity doctrine, discounts to particular customers will not be deemed unlawful if the new rate is offered to met competition and thereby promotes reasonable rates for all users.^{29/} The Commission has long found this policy essential in other communications services to allow operators to compete effectively as well as to provide affordable service to customers. Nothing in the Cable Act or the doctrine itself suggests that the competitive necessity doctrine would have anything but similar beneficial effects in the cable context.

Cable operators need this kind of pricing flexibility to respond to attempts by competitors to engage in cream-skimming low-cost and high revenue areas -- a practice that would tend to drive up rates paid by other customers. By permitting quick response to a competitor's price reductions, the doctrine enables operators to retain their customer base. Because fixed costs continue to be spread over a larger group of subscribers, all cable customers would benefit from

^{28/} Id. at 267.

^{29/} See AT&T Communications, 4 FCC Rcd 7712, (1988); Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 948 (1984). Private Line at 948.

application of the doctrine. Moreover, arms length commercial transactions between the cable operator and an MDU owner or manager do not involve the same dynamics or relative bargaining positions that underlie the individual consumer protection thrust of the 1992 Act. MDUs, whether transient or longer-term residences, have access to SMATV and wireless cable systems; thus the rationale which exists for regulation of rates to individual consumers is not present. For these reasons, cable operators should be able to invoke the competitive necessity doctrine to meet competitive challenges.

B. Evidentiary Hearings and Due Process Safeguards
Should be Available To Protect Cable Operators

The Order provides that local franchising authorities should have the flexibility to "decide for themselves whether and when to conduct formal or informal hearings as long as they act on rates cases within the prescribed time periods we have established and provide interested parties with notice and meaningful opportunity to participate."^{30/} This passage suggests that the nature of procedure used is left to the unfettered discretion of the franchising authority. The Commission should clarify that due process concerns may require a formal hearing under certain circumstances.

It is well established that the Due Process Clause of the Fifth Amendment requires that, prior to deprivation of a

^{30/} Report and Order at 86.

property interest, the affected parties must be afforded an opportunity for hearing.^{31/} Further, where there are disputed issues of material fact to be resolved, the decision-making authority must conduct a formal trial-type hearing.^{32/} while Joint Petitioners agree that the flexibility to use informal procedures in rate cases could reduce administrative burdens on both the reviewing authority and the cable operator, such procedures might not always be sufficient to protect the operator's rights. Accordingly, the Commission should clarify that, in such cases where material issues are in dispute, the reviewing authority must convene an evidentiary hearing upon the request of the cable operator and the submission of a reasoned analysis as to why such a hearing is necessary.

C. The Commission Should Permit the Settlement of Rate Cases

The Report and Order states that "the regulatory structure established by Section 623 of the Cable Act does not appear to give cable operators and franchising

benchmark rates and price-cap mechanism established by the Act may not be undermined, the Commission or local authority is afforded some degree of decisional discretion in the review of cost of service showings. Nothing in the Act suggests that this discretion would not include the ability to settle a rate case. Indeed, the availability of settlements in this context would clearly serve the public interest as this option could significantly reduce the costs and time of rate review for both the operator and the reviewing authority. Accordingly, the Joint Petitioners request the Commission to clarify that rate cases are subject to settlement so long as the regulatory authority explains why it is in the public interest to do so.

IV. CONCLUSION

The Joint Petitioners concur that a rate regulation scheme utilizing benchmarks as the primary method and traditional cost-of-service cases as a safeguard in appropriate cases can be structured in a manner which

detrimental, albeit unintended consequences for the cable television industry.

Respectfully submitted,

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